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IN THE

Supreme Court of the United States

October Term, 1946.

No. 1072

E. E. SWALLEY,
Petitioner,

vs.

ADDRESSOGRAPH-MULTIGRAPH CORPORATION,
Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF

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vs.

ADDRESSOGRAPH-MULTIGRAPH CORPORATION,
Respondent and Appellant below.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Although Respondent's Brief contains numerous erroneous assertions of fact and specious arguments, it is significantly devoid of any valid ground for denial of the writ of certiorari, and Respondent's labored efforts to cloud the issues of this case reinforce the merits of Petitioner Swalley's prayer for a writ of certiorari and affirmance of the District Court judgment in his favor.

Petitioner respectfully points out that Respondent Company has failed to cite any legal authorities or propositions in conflict with those relied upon by Petitioner Swalley, and Respondent Company has failed to disprove or weaken any one of the following points of Petitioner Swalley's Brief:

1. The law of Ohio requires an interpretation of the agency contract in favor of Plaintiff Swalley. (Petitioner's Brief, p. 17-21).

2. The parties adopted a practical construction of the contract whereby the word "use" includes "storage". (Petitioner's Brief, p. 21-25).

3. The Company's bulletin of October 31, 1941 did *not* in fact apply to the transactions in question and did not constitute a practical construction of the contract operative in this case. (Petitioner's Brief, p. 26-28).

4. The Defendant Company failed to plead modification, the case was not tried on that issue, and Plaintiff Swalley did not have an opportunity to introduce evidence on that point. (Petitioner's Brief, p. 28-31).

5. There was no effectual modification of the written contract applicable to the case at bar. (Petitioner's Brief, p. 31-36).

Respondent made no effort to overcome Petitioner's argument that there was no assent or acquiescence by Petitioner, that there was no new consideration moving to him, that there is no *factual* basis for application of the rule that a contract, terminable at will, may be modified at any time by either party as a condition of its continuance, and that the purported modification was invalid under the Ohio Statute of Frauds.

6. Plaintiff Swalley acquired vested rights to the commissions in question which could not be adversely affected by a later purported modification of the agency contract. (Petitioner's Brief, p. 36-43).

In order to dispel any possible confusion that might arise on account of the Respondent Company's erroneous assertions of fact and specious arguments, Petitioner Swalley respectfully urges this Honorable Court to consider the following points.

1. Respondent erroneously asserts as a fact that the reason for the split-commission arrangement under the agency contract is that "the agent in whose territory the machines are to be used has the expense of installing these machines, training the customer's employees in the operation of the machines and servicing the machines for the customer as such service is required". (Respondent's Brief, p. 3). The Circuit Court of Appeals was misled into making the same erroneous statement (R. 376).

(a) Respondent ignores the fact that under the express terms of the split-commission clause of the contract (R. 248) and under the practical construction of the contract by the parties themselves (R. 259-260), Plaintiff Swalley's rights to the split-commissions in question attached and accrued at the time that the machines were sold, and could be divested only by operation of the *condition subsequent* of the 90-day clause (R. 248-249). Since the District Court found *as a fact* (R. 328) that the machines remained in Swalley's territory more than 90 days, and, so far as the record discloses, the machines are still there, the condition subsequent did not occur, and it is utterly immaterial whether the machines were ever actually installed and operated.

(b) Respondent also ignores the fact that paragraph 5 of the agency contract (R. 247) expressly provides that commissions will be credited to the agent's commission account on the Company's books *when shipment of goods is made.*

(c) The error of Respondent's assertion is further proved by the fact that the agents received extra compensation for installation and made special charges against the customers for travel time, cost of transportation, hotel expense, and actual time consumed in servicing and repairing the machines (R. 299, 305, 306, 308).

(d) Respondent's statement is further refuted by the Record of this case (R. 300) which shows that the Company itself had actually credited Swalley with 75% of the Commission on a machine which was installed by the agent who succeeded him after the Company had terminated Swalley's contract because he was inducted into military service.

2. Respondent erroneously asserts as a fact that the machines in question "were installed by the agents in territories other than petitioner's and they were paid the remaining 75% of the entire commission". (Respondent's Brief, p. 5, 15-18).

There is no factual basis for this statement and it is directly contrary to the finding of facts by the District Court.

(a) In its Finding of Facts (R. 328-329) the District Court stated:

> "3. The Court finds as a matter of fact that the machines and attachments shipped to the Mobile Air Depot pursuant to the aforesaid three War Department orders remained in plaintiff's territory more than ninety days beyond the date the same were delivered therein, and that the defendant has not paid any agent any commission upon the same, except a commission of 25% of the total 35% commission provided for in its Dayton Agent's contract, which was identical in terms with plaintiff's contract, and except for the sum of $6,324.94 paid to the plaintiff".

In its opinion (R. 327) the District Court declared: "So far as is disclosed by the record, the machines shipped into the Mobile territory are still there and no agent has been paid any commission upon the same except the sum admitted to have been paid to the plaintiff herein".

The finding of facts by the District Court must be accepted "unless clearly erroneous", according to Rule 52 of

the Federal Rules of Civil Procedure. The evidence relied upon by Respondent certainly fails to disclose any error on the part of the District Court and it is wholly inadequate to support Respondent's contention.

(b) The fact remains that the burden was upon the Defendant Company to prove that the condition subsequent of the 90-day clause of the contract (R. 248) operated in this case to divest Plaintiff Swalley of his rights to the commissions which had already accrued. Although the Company claimed that it had the necessary records in its possession (R. 191 and Respondent's Brief, p. 16), and although it had every opportunity to introduce its records at the trial, it failed to introduce any evidence on that point. It failed to do so for the obvious reason that it well knew that the records in its possession would not support its present contention.

As stated in *Sprickerhoff v. Baltimore & Ohio Railroad Co.*, 323 Ill. App. 340, 345, 55 N.E. (2d) 532, 535 (1944):

> "Where the evidence to prove a fact is chiefly, if not entirely in control of the adverse party and such evidence is not produced, his failure to produce it tends to strengthen the probative force of the evidence given to establish such alleged fact, *and the burden is upon such adverse party to produce that evidence before he can deny the fact.* If he fails to produce it, a presumption arises in favor of the existence of the fact, for it will be assumed that he would produce it if it is in his favor". (Italics supplied).

In 31 C. J. S. "Evidence" par. 156 (a), p. 847, it is declared:

> "The unexplained failure or refusal of a party to produce evidence, or the most satisfactory evidence, in his possession, or to submit to a physical examination, may give rise to an adverse inference".

(c) It is a matter of crucial significance that the Defendant Company does not deny that the machines in question remained in Swalley's territory *for more than ninety days*. Hence, even assuming, for the sake of argument, that the machines were ultimately shipped out of Swalley's territory after remaining there for more than ninety days, that would still not relieve Defendant Company of liability to Swalley for the commissions in suit, for those commissions had already accrued and could not be divested except by shipment of the machines out of his territory *within* the ninety-day period. Assuming further, for the sake of argument, that Defendant Company paid other agents the commissions to which Swalley was entitled (and there is no evidence of such payments), by what process of reasoning does the Company conclude that Plaintiff Swalley should suffer the penalty for the Company's unwarranted action?

3. Respondent erroneously asserts as a fact that Swalley "was not given credit for any commission on machines shipped to the Mobile Depot for storage" (Respondent's Brief, p. 7). This is refuted by Respondent's own Answer to the Complaint (R. 24), wherein Respondent alleged that Plaintiff Swalley "was entitled to receive, and was paid, seventy-five per cent of the commission on machines shipped into the Mobile Air Depot *for storage* under Purchase Order No. (535) 42-15979 which were subsequently placed in use".

Thus the Company admitted in its Answer that the term "to be used" in the agency contract includes "for storage", and this admission knocks out the only prop of its present argument, for as Swalley's rights to the commissions accrued at the time of the sale of the machines they were not contingent or dependent upon future installation and operation. This also disposes of the Respondent's painful

effort (Respondent's Brief, p. 20) to distinguish the instant case from the situation covered by the Company's famous letter of May 26, 1941 (R. 259-260)

4. The Defendant Company relies upon a certain transaction involving a machine shipped into Swalley's territory from Middletown, Pennsylvania. (Respondent's Brief, p. 6). This transaction does not support the Company's position, because for aught appearing from the record the machine had been re-shipped from Middletown *within* the 90-day period, and hence payment of the split-commission to Swalley was in accordance with the terms of the agency contract and the practical construction thereof by the parties.

5. It is quite amusing that the Defendant Company has felt compelled to resort to the specious reasoning that interpretation of the agency contract in favor of Plaintiff Swalley would impose upon the Company the obligation to pay double commissions. (Respondent's Brief, p. 9-10). Obviously, if Plaintiff Swalley is entitled to split the 35% commission with the selling agent, then no other agent would be legally entitled to any part of the commission, and the Company itself construed and applied the contract in favor of Swalley's contention in its letter of May 26, 1941 (R. 259-260).

6. In Respondent's Brief the erroneous statement is frequently asserted that Plaintiff Swalley "resigned" as agent of the Company in March, 1943. The truth is that Swalley did not voluntarily resign, but when the Company learned of his imminent induction into military service, it wrongfully and in bad faith sent Swalley formal notice of termination of the contract (R. 255), which Swalley duly protested (R. 257, 280). This was the Company's interpretation of the "G. I. Bill of Rights" and a magnanimous ex-

pression of its appreciation for Swalley's loyal and painstaking efforts, which had earned him the highest sales honors of the Company (R. 261, 262).

CONCLUSION

Petitioner Swalley respectfully prays that this Honorable Court grant a writ of certiorari and affirm the judgment of the District Court in his favor.

Respectfully submitted,
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Birmingham, Alabama,
March 26, 1947.